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ORNI 8, LLC, and ORPUNA, LLC d/b/a Puna Geothermal Venture and International Brotherhood of Electrical Workers, Local 1260. Cases 20–CA–096143 and 20–RC–078220

November 26, 2014

**DECISION, CERTIFICATION OF
REPRESENTATIVE, AND NOTICE TO
SHOW CAUSE**

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND SCHIFFER

On March 26, 2013, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 87. Thereafter, the General Counsel filed an application for enforcement with the United States Court of Appeals for the Ninth Circuit, and the Respondent filed a cross-petition for review.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has consolidated the underlying representation proceeding with this unfair labor practice proceeding and delegated its authority in both proceedings to a three-member panel.

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. The Board's May 26, 2013 decision states that the Respondent is precluded from litigating any representation issues because, in relevant part, they were or could have been litigated in the prior representation proceedings. The prior proceedings, however, also occurred at a time when the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm, and we do not give them preclusive effect. Accordingly, we consider below the representation issues that the Respondent has raised in this proceeding.

In its response to the Notice to Show Cause, the Respondent reiterates its objections to the election alleging that the Board's rulemaking initiatives and/or the Em-

ployer's posting of the Notification of Employee Rights created an appearance of bias; that Abel Costa was a supervisor who should be excluded from the unit and whose pronoun remarks interfered with the election; that the Union made improper promises of union benefits and made false and misleading statements to employees; and that the Union engaged in improper electioneering on the day of the election.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the Respondent's objections to the election held May 14, 2012, and the Regional Director's report and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 11 votes for and 8 against the Petitioner, with 1 void ballot and no challenged ballots.

With regard to the allegation that the Board's rulemaking initiatives and/or the Employer's posting of the Notification of Employee Rights created an appearance of bias, the Board has reviewed the record in light of the exceptions and brief, and has adopted the Regional Director's findings and recommendations. Accordingly, Objections 11, 12, 13, 14, 15, and 16 are overruled.¹

With regard to the remainder of the Respondents objections, the Board has reviewed the hearing officer's report and record in light of the exceptions and briefs. We have also considered the Board's December 14, 2012 Decision and Certification of Representative, and we agree with the rationale stated therein. Accordingly, we adopt the hearing officer's findings and recommendations to the extent and for the reasons stated in the December 14, 2012 Decision and Certification of Representative, which is incorporated herein by reference, and find that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Brotherhood of Electrical Workers, Local 1260, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All full-time and regular part-time operations and maintenance employees. Excluded: All other

¹ The Respondent excepted to the Regional Director's recommendation to overrule Objections 11, 12, 13, 14, 15, and 16. In the absence of exceptions, we adopt pro forma the Regional Director's finding that the Respondent's Objections 1, 2, 4, 5, and 7 raised substantial and material issues of fact warranting a hearing. The Regional Director approved the Respondent's request to withdraw Objections 3, 6, 8, 9, and 10.

employees, guards and supervisors as defined in the Act.

NOTICE TO SHOW CAUSE

As noted above, the Respondent has refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. Courts of Appeals. Although the Respondent's legal position may remain unchanged, it is possible that the Respondent has or intends to commence bargaining at this time. It is also possible that other events may have occurred during the pendency of this litigation that the parties may wish to bring to our attention.

Having duly considered the matter,

1. The General Counsel is granted leave to amend the complaint on or before December 8, 2014, to conform with the current state of the evidence.

2. The Respondent's answer to the amended complaint is due on or before December 22, 2014.

3. NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before January 12, 2015 (with affidavit of

service on the parties to this proceeding), as to why the Board should not grant the General Counsel's motion for summary judgment. Any briefs or statements in support of the motion shall be filed by the same date.

Dated, Washington, D.C. November 26, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD